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No. 96-113

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM,
Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to evaluate the hypothetical question of the district court's exercise of supplemental jurisdiction under 28 U.S.C. § 1367 where the court held that the district court had arising-under jurisdiction under 12 U.S.C. § 1441a.

2. Whether 28 U.S.C. § 1446(d) authorizes a district court to enjoin wholly duplicative state-court actions when it makes factual findings—that are unchallenged on appeal—that the state-court actions were filed to subvert federal removal jurisdiction.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed by the petitioner, the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Pursuant to Supreme Court Rule 29.6, respondent KPMG Peat Marwick LLP states that it is a limited liability partnership with no parent companies or subsidiaries. Respondent Robert W.L. Spence is an individual.

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BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

KPMG Peat Marwick LLP and Robert W.L. Spence ("Peat Marwick") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by the Kansas Public Employees Retirement System ("KPERS").

The petition involves one of a series of procedural gambits by petitioner to circumvent an adverse ruling by the Eighth Circuit on the statute of limitations applicable to petitioner's garden-variety tort claims arising out of investment losses. Facing almost certain defeat as a result of the application of that ruling, petitioner took the extraordinary step of filing what the district court found to be wholly duplicative state-court actions. Petitioner did so, as its counsel candidly admitted at the time, to avoid

the application of the Eighth Circuit's decision and thus, as the district court found, to subvert federal removal jurisdiction.[1] Consequently, the district court entered the preliminary injunction that is the subject of this appeal.[2]

The question under 28 U.S.C. § 1367 raised by the petition—whether the exercise of supplemental jurisdiction after the dismissal of federal claims raises issues of subject-matter jurisdiction—is not worthy of this Court's attention. Any ruling by this Court on that issue would have no impact on the district court's jurisdiction over this case because the petition does not challenge the Eighth Circuit's principal holding that the district court had arising-under jurisdiction under 12 U.S.C. § 1441a. Moreover, there is no conflict among the courts of appeals about any aspect of the Eighth Circuit's decision affirming the district court.

DECISIONS BELOW

In addition to the decisions below referred to in the petition, on July 22, 1996, the district court ordered that the preliminary injunction challenged here be made permanent. *See* Appendix to Opposition, pp. 1a-2a, 5a-6a ("Opp. App.").[3] Petitioner has appealed the entry of the permanent injunction to the Eighth Circuit. *See id.*, pp. 9a-10a. The district court also granted summary judgment to Peat Marwick, *see* Order Granting KPMG/Peat Marwick's and Robert W.L. Spence's Motion for Sum-

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[1] Petitioner's other procedural gambits included a motion to reconsider the district court's year-and-a-half old ruling that KPERS performs proprietary, rather than governmental, functions and a motion to disqualify the district judge, which was rejected by the Eighth Circuit. *See* Appendix to Opposition, pp. 16a-17a, 21a-22a ("Opp. App.").

[2] That preliminary injunction has recently been superseded by a permanent injunction. As a result, there is no controversy for this Court to review concerning the preliminary injunction.

[3] This brief refers to the appendix to the petition as "Pet. App."

mary Judgment, in *KPERS v. Reimer & Koger Assocs., Inc.*, No. 92-0922-CV-W-9 (W.D. Mo. Jul. 25, 1996), and has now entered final judgment in favor of Peat Marwick, *see* Opp. App., pp. 7a-8a.

Subsequent to the decision appealed from here, the Eighth Circuit rejected petitioner's petition for a writ of mandamus directing the district judge to disqualify himself; that opinion is reported at 85 F.3d 1353 (8th Cir. 1996) ("*KPERS V*"). *See* Opp. App., pp. 11a-34a. Previously, the Eighth Circuit issued reported opinions in four other related interlocutory appeals, two of which this Court has declined to review. *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608 (8th Cir. 1995) ("*KPERS III*"), *cert. denied*, 116 S. Ct. 915 (1996); *KPERS v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304 (8th Cir. 1995) ("*KPERS II*"); *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993) ("*KPERS I*"), *cert. denied*, 114 S. Ct. 2132 (1994).

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate in many respects. Nevertheless, for present purposes, only four corrections need be made.

1. The petition challenges the preliminary injunction that the district court entered against the action petitioner filed in Kansas state court against Peat Marwick after the Eighth Circuit issued its ruling on the statute of limitations. Before issuing the preliminary injunction, the district court specifically found (in the Eighth Circuit's words) that petitioner's newly filed state-court action against Peat Marwick was "an attempt to subvert the removal of the earlier case," [4] and that "the new suit was

[4] Although petitioner originally filed this case in Kansas state court, the RTC removed the entire action to federal court pursuant to 12 U.S.C. § 1441a(*l*)(3)(A) after a third-party complaint was

substantially identical to the old." Pet. App., p. 11a. Those findings were based in part on petitioner's own statement to the press that petitioner had filed the new state-court actions because of a "multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations." *Id.*, p. 4a. The Eighth Circuit affirmed those findings, *id.*, and petitioner has not sought review of them here.

2. Petitioner's complaint about delay in federal court rings hollow: any delays in this litigation have been the result of petitioner's tactics. For example, after the third-party complaint was filed against the RTC, petitioner successfully moved the Kansas state judge, in an *ex parte* hearing with no notice to any defendant or to the RTC, to sever the third-party complaint from the rest of the action. Because of petitioner's improper conduct in state court, upon removal by the RTC the district court was forced to consider whether the RTC had removed the entire case or only the third-party complaint against it. After lengthy hearings, the district court held that the state court's severance order violated the Supremacy Clause and that the RTC had removed the entire case; the Eighth Circuit affirmed. *KPERS I*, 4 F.3d at 619. As another example, the Eighth Circuit recently observed that after its ruling on the statute of limitations, petitioner "undertook a flurry of actions which occupied the district court's time to the detriment of the efficient resolution of this case." Opp. App., p. 21a. In addition to filing the duplicative state-court actions, petitioner sought disqualification of the district judge, prompting the Eighth Circuit to comment: "[o]ur review of KPERS' pattern of conduct leads us to conclude that the defendants' allegation that KPERS' recusal motion and this petition were filed

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filed against it. The Eighth Circuit, in a ruling not challenged here, affirmed the initial removal to federal court. *KPERS I*, 4 F.3d at 622, *cert. denied*, 114 S. Ct. 2132 (1994).

for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge, is correct." *Id.*, p. 23a.

3. Petitioner's representation that "the RTC had informed the district court that it had no interest in the case's remaining in federal court," Pet., p. 6, is grossly misleading. The RTC has been continually involved in this case to ensure that the claims being asserted by petitioner against certain defendants were not derivative claims that rightly belonged to the RTC as receiver of a failed savings and loan. In fact, the RTC itself moved to intervene in the case long before it was served with the third-party complaint; the Kansas state judge refused to rule on the RTC's motion to intervene for over five months, and it became moot after the third-party complaint was filed against the RTC. After the district court dismissed that third-party complaint against the RTC, it granted the RTC's motion to be a limited intervenor. Plaintiff's Appendix in the Eighth Circuit, pp. 772-74. Thus, the RTC remained involved in the case after the dismissal of the third-party complaint against it; it even attended many of the ensuing depositions to protect its interests.

4. Petitioner's characterization of this action as "civil fraud claims . . . pursued by Kansas in its sovereign capacity in lieu of a criminal prosecution," Pet., p. 3, is false. Peat Marwick has never been charged with an intentional tort, but only with negligence. There is no basis whatsoever for Kansas to bring any criminal action against Peat Marwick. Nor is this action pursued by Kansas in its sovereign capacity. The district court found that petitioner acted in a proprietary, as opposed to governmental, capacity, *see* Appendix of Peat Marwick in the Eighth Circuit, pp. 45-49, and petitioner did not appeal that ruling.[5]

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[5] Indeed, by enacting a statute of limitations applying *only* to petitioner, *see* KAN. STAT. ANN. § 60-522 (1992), not generally to

REASONS FOR DENYING THE PETITION

This petition presents no questions worthy of this Court's attention. The first question—which challenges only one of the Eighth Circuit's two alternative bases for jurisdiction and which thus would not change the result in this case—seeks a novel holding with respect to an area of law as to which there is no conflict among the courts of appeals. The second question, by its own terms, seeks an advisory opinion only. The third question presents no conflict among the courts of appeals, but rather is resolved by the district court's affirmed findings of fact. Finally, all three questions present no controversy for this Court to review because the preliminary injunction challenged here has been superseded by a permanent injunction, now on appeal to the Eighth Circuit.

1. *The answer to the petition's first question would have no effect on the outcome of this case.* The petition's first question—a challenge under 28 U.S.C. § 1367—attacks dicta only, as it ignores the principal, independent basis for the Eighth Circuit's decision: arising-under jurisdiction under 12 U.S.C. § 1441a. The Eighth Circuit explained:

> [U]nder 12 U.S.C. § 1441a(*l*)(1) once the RTC becomes a party to the case, the entire action is "deemed to arise under the laws of the United States" and is within the original jurisdiction of the district court. Therefore, the federal court has arising-under, *rather than supplemental*, jurisdiction even over the claims that do not involve the RTC.

Pet. App., p. 6 (emphasis added).[6] The petition does not

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the government, the Kansas legislature recognized that petitioner exercises proprietary functions subject to a statute of limitations.

[6] The Eighth Circuit further stated:

> We conclude that the purpose of the RTC removal statute, 12 U.S.C. § 1441a(*l*), is to provide a federal forum for the

challenge the Eighth Circuit's principal holding—that the district court had arising-under jurisdiction under § 1441a —which is consistent with the holding of every other court of appeals to have considered the issue.[7] Thus, even if this Court were to find petitioner's supplemental-jurisdiction arguments to be legally correct, that issue could have no effect on this case.[8] This Court should not grant certiorari to review an issue that, because of an unchallenged alternative holding, is of no importance to the particular case before the Court. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).[9]

In any event, even assuming away, *arguendo*, the Eighth Circuit's principal holding, certiorari on the supplemental-jurisdiction question would not be warranted. First, there is no conflict among the courts of appeals on

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entirety of any case to which the RTC is a party at the time of removal.

Pet. App., p. 12.

[7] *E.g., Spring Garden Assocs. v. RTC*, 26 F.3d 412, 415-16 (3d Cir 1994) (§ 1441a(*l*)(1) confers original federal jurisdiction over "the entirety of any case to which the RTC is a party and not just those claims in such a case brought by or against the RTC"); *California v. Keating*, 986 F.2d 346, 348 (9th Cir. 1993) ("the addition of the RTC as a party transforms the entire action into one that 'arises under' the laws of the United States").

[8] Petitioner apparently recognizes this problem, as it attempts to relegate the Eighth Circuit's independent holding to a "brief[] suggest[ion]." Pet., p. 11 n.10. This mischaracterizes the Eighth Circuit's decision. Far from being a brief suggestion, the Eighth Circuit's holding that the district court had arising-under jurisdiction under § 1441a is its principal holding.

[9] The issue whether a federal court has arising-under jurisdiction under § 1441a over all claims even when claims involving the RTC are dismissed before trial is unlikely to recur. Not only are there extremely few cases removed under § 1441a in which the RTC is not a party to the end—indeed the RTC even remained a limited intervenor in this case after the third-party complaint against it was dismissed—but also the RTC ceased to exist after December 1995, *see* 12 U.S.C. § 1441a(m).

this subject: petitioner's attempt to fashion such a conflict relies on dictum only and does not take account of this Court's opinion in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349-50 (1988). Second, exercising supplemental jurisdiction was not an abuse of discretion under the peculiar circumstances of this case, all of which were omitted from the petition.

In attempting to fashion a conflict among the courts of appeals, petitioner relies heavily on what it characterizes as the Eighth Circuit's "admitted conflict with decisions in two other circuits." Pet., p. 11. There is no such conflict. The first alleged "conflict" is with *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc). Although the panel opinion, 69 F.3d 556 (D.C. Cir. 1995), *vacated*, 74 F.3d 303 (D.C. Cir. 1996), which the Eighth Circuit refused to follow, *see* Pet. App., p. 7a n.3, did hold that the decision to exercise supplemental jurisdiction involves subject-matter jurisdiction, the en banc court held the opposite: it stated that the decision to exercise supplemental jurisdiction "is *not* a jurisdictional determination." 87 F.3d at 1369 (emphasis added). Petitioner's understandable affection for the dissent notwithstanding, the en banc opinion is squarely in agreement with the Eighth Circuit's decision. The other purported "conflict" is with a footnote in *Maguire v. Marquette University*, 814 F.2d 1213, 1218 n.4 (7th Cir. 1987), in which the Seventh Circuit states that the question whether the district court should have exercised pendent jurisdiction "is jurisdictional." [10] The Seventh Circuit, however, recently

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[10] Given that in *Maguire* the Seventh Circuit itself treats the question as discretionary—the court held that because "the district court did not articulate, nor does the record reveal, any pressing reasons for retaining jurisdiction over the plaintiff's pendent state law academic freedom claim," "it was therefore an abuse of discretion for it to do so," *id.* at 1218—that footnote is at most dictum. Moreover, *Maguire* was decided before this Court reiterated the discretionary nature of pendent jurisdiction in *Cohill*, 484 U.S. at 349-50.

addressed petitioner's precise question and held that even where a lower court improperly exercises supplemental jurisdiction, it nevertheless has subject-matter jurisdiction over the case. *Myers v. County of Lake, Indiana*, 30 F.3d 847, 849-50 (7th Cir.), *cert. denied*, 115 S. Ct. 666 (1994). Thus, there is no conflict among the circuits.

Not only is there no conflict among the courts of appeals on this issue, but also the Eighth Circuit's refusal to consider petitioner's untimely challenge[11] to the district court's exercise of supplemental jurisdiction is clearly correct. The plain language of § 1367—"district courts *may* decline to exercise supplemental jurisdiction over a claim" (emphasis added)—indicates that the decision to exercise supplemental jurisdiction implicates discretion only, and not subject-matter jurisdiction.[12] Such an interpretation of § 1367 is consistent with this Court's holding regarding pendent jurisdiction in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966), and its discussion of the *Gibbs* holding in *Cohill*, 484 U.S. at 349-50. In addition, the courts of appeals regularly treat the decision to exercise supplemental jurisdiction under § 1367 as involving discretion only, and not subject-matter jurisdiction, even where the decision to exercise supplemental jurisdiction was inappropriate. *E.g., Myers*, 30 F.3d at 849-50.

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[11] Petitioner did not seek appellate review of the district court's June 1994 decision to exercise supplemental jurisdiction after dismissing the third-party complaint against the RTC, but did so immediately after the Eighth Circuit's July 1995 ruling on the applicable statutes of limitations, a ruling that has proved to be dispositive.

[12] The legislative history confirms this. *See* H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 ("[§ 1367(c)] codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, *even though it is empowered to hear the claim*" (emphasis added)).

Moreover, the district court did not abuse its discretion in retaining jurisdiction under the peculiar circumstances of this case, because there are no complex decisions of state law presented [13] and because considerations of judicial economy, convenience, and fairness to the litigants all favor the exercise of supplemental jurisdiction. *See Gibbs*, 383 U.S. at 726. Considerations of judicial economy continue strongly to favor a denial of remand: as of June 1994, when the district court decided to exercise supplemental jurisdiction over the remaining claims after dismissing the third-party complaint against the RTC, the district court had already spent more time on this case than on any other except one, *see* Opp. App., p. 12a, and a year's worth of intensive discovery followed, *see id.*, p. 16a. Convenience also favors the retention of jurisdiction: the federal courts have had jurisdiction over this complex multi-party case since 1992, *see KPERS I*, 4 F.3d at 616, and the district court has now entered final judgment in favor of all of the defendants but one, Opp. App., pp. 1a, 4a-8a.

Finally, the fairness factor also favors continued exercise of supplemental jurisdiction. Kansas state court judges are beneficiaries of KPERS and stand to gain from a judgment in its favor. *Cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986) (Due Process Clause forbids state judge from hearing case from which he stands to benefit financially), and cases cited therein. In addition, after the third-party complaint was filed against the RTC, the Kansas state judge "acted *ex parte* with the stated purpose of limiting the RTC's right to remove" when he severed the third-party complaint filed against the RTC from the underlying action in violation of the Supremacy Clause. *KPERS I*, 4 F.3d at 619.

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[13] The Eighth Circuit described this case as follows: "KPERS has sued several defendants to recover money it lost in a bad investment. This case only requires the conduct of the defendants be measured against the duties imposed by tort and securities law." Pet. App., p. 13a.

2. *The second question inappropriately seeks an advisory opinion.* The petition's second question—which also involves 28 U.S.C. § 1367—again ignores the fact that the principal holding below is based on 12 U.S.C. § 1441a. Moreover, not only is the second question entirely dependent on the acceptance of the first question and on agreement with petitioner that decisions to exercise supplemental jurisdiction after dismissal of the federal claims involve subject-matter jurisdiction, the petition concededly seeks an advisory opinion only: it simply asks this Court to "clarify for the Eighth Circuit on remand, and for the courts of appeals generally, the relevance under Section 1367(c) of abstention doctrines and other principles of comity." Pet., p. 14. It is well established, however, that this Court does not render advisory opinions. *E.g., Trailmobile Co. v. Whirls,* 331 U.S. 40, 48 (1947).

Another flaw in the second question is its premise, *viz.*, that the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971), would bar an injunction in this case. Under *Younger,* a federal court may not enjoin a pending criminal prosecution that is brought in good faith. *Id.* at 54. Despite the petition's repeated mischaracterizations, Peat Marwick has never been charged with an intentional tort, much less with any fraud for which it could have been criminally prosecuted. *See* Pet., p. 14. In addition, as the Eighth Circuit correctly held, Pet. App., pp. 13a-14a, abstention under *Younger* is inappropriate where, as here, federal courts have exclusive jurisdiction over an action. *E.g., Levy v. Lewis,* 635 F.2d 960, 967 (2d Cir. 1980).[14] Yet the petition does not challenge the Eighth Circuit's holding that under 12 U.S.C. § 1441a, the district court has exclusive jurisdiction over this case. *See* Pet. App., p. 13a.

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[14] There is no conflict among the courts of appeals regarding this issue.

3. *The third question is contrary to the facts found by the district court.* With its third question, the petition seeks to have this Court hold that federal courts cannot enjoin later-filed state-court actions "crafted 'for the purpose of subverting federal removal jurisdiction.'" Pet., p. 16. As phrased, the third question does not apply to this case because its factual prerequisites—that the state-court case is a "separate" case that is "legally distinct" from the removed case—are not met here. Rather, as the district court found (and the Eighth Circuit affirmed), petitioner's new state-court action "was substantially identical to the old" and "was an attempt to subvert the removal of the earlier case." Pet. App., p. 11a.[15] Petitioner does not challenge those factual findings in its petition.[16]

Not only does the question presented have no applicability to the facts of this case,[17] but also there is no conflict between the courts of appeals on this issue. No court of appeals has ever held that a litigant may subvert the removal jurisdiction of the federal courts by later filing a wholly duplicative action in state court. Far from

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[15] Indeed, any state-court action in this case would necessarily subvert federal removal jurisdiction because the Eighth Circuit held—and that holding is not challenged here—that the district court had *exclusive* jurisdiction over the *entire case* by virtue of 12 U.S.C. § 1441a. *See* Pet. App., p. 14a. Any cases where the statutory grant of jurisdiction is (a) concurrent and (b) extends only to a particular claim would not be comparable.

[16] Even if petitioner had challenged those factual findings, that would not warrant a writ of certiorari. It is well established that this Court does not "grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), much less findings of fact "in which two courts below have concurred," *United States v. Doe*, 465 U.S. 605, 614 (1984).

[17] Petitioner's contention that "neither the 1991 nor the 1995 suits filed by petitioner in Kansas state court were removable," Pet., p. 16, begs the question: the 1991 suit was removed under 12 U.S.C. § 1441a, and the Eighth Circuit affirmed that removal, *see KPERS I*, 4 F.3d at 622. Petitioner does not here challenge the initial removal.

creating a circuit conflict, the cases cited in the petition recognized the rule applied by the Eighth Circuit, but found that it did not apply to their facts.[18]

4. *The preliminary injunction has been superseded.* This Court should not grant certiorari because none of the three questions presents a continuing controversy for this Court to review. The petition challenges the Eighth Circuit's affirmance of a preliminary injunction which has been superseded by a permanent injunction. *See* Opp. App., pp. 1a-2a, 5a-6a. Petitioner has separately appealed that permanent injunction to the Eighth Circuit. *Id.*, pp. 9a-10a. The appeal from the preliminary injunction is therefore superseded. *E.g., Webb v. GAF Corp.*, 78 F.3d 53, 56 (2d Cir. 1996) (per curiam). In these circumstances, the petition should be denied. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 18.5, at 724 (7th ed. 1993); *cf. Faulkner v. Jones*, 116 S. Ct. 331 (1995) (dismissing petition).

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[18] In *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975), the Fifth Circuit stated that where "a district court finds that a second suit filed in state court is an attempt to subvert the purposes of the removal statute, it is justified and authorized by § 1446(e) [now § 1446(d)] in enjoining the proceedings in the state court." The Fifth Circuit nevertheless vacated the injunction challenged in that appeal because the second suit, which added an additional defendant, "was not brought in an attempt to subvert the purposes of the removal statute and was not aimed at defeating federal jurisdiction." *Id.* Similarly, in *Lou v. Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), the Ninth Circuit recognized that an injunction is proper if the district court finds that a second state-court action was filed in an attempt to subvert the purposes of the removal statute. The Ninth Circuit nevertheless held that no injunction was authorized in that case because the second suit, which involved different plaintiffs, additional counsel, additional defendants, and only state claims, had not been filed in an attempt to subvert the purposes of the removal statute. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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